In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, OF NEW YORK, (a corporation), and the HELENA POWER AND LIGHT COMPANY, (a corporation),

Appellants,

vs.

JOHN W. WARREN,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

T. J. WALSH,
Counsel for Appellee.

R. R. PURCELL and
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In addition to the authorities cited in the original brief on the proposition that, except by virtue of some statute clearly giving the right, an appeal will not lie from a part of a judgment, and that the ordinary statute permitting appeals from final judgments will not warrant an appeal from a part of a judgment, the attention of the court was called at the argument to the case of

Farmer's Bank vs. Key, 33 Ore. 443.

The citation is here noted for reference by the court. Authorities can be found to the effect that a party has no right to complain of a portion of a decree which does not affect his interests, but by an examination of the cases it will be found that they do not hold that he may appeal from that part of the decree which does affect his interests, but declare simply that he may appeal from the whole decree, and on such appeal will be heard to urge

error only in respect to those particulars by which his rights are affected.

Other authorities will be found which are to the effect that where there are two separate and independent parts to the decree, so that the one is not affected by the other, a party may appeal from the decree and allege error in one particular, though he has by execution or otherwise enforced the other part. In the same manner, these authorities do not permit an appeal from the part of the decree with respect to which it has not been enforced, but they hold simply that the party may take an appeal from the entire decree, with the right to assert error in that part which he has not enforced, but not in that part which he has enforced.

A careful scrutiny has convinced the writer that the authorities are uniform to the effect that unless the statute expressly or by clear implication gives the right to appeal from a part of a judgment or decree, such an appeal will not lie.

As stated in the original brief, the California statute clearly gives the right, and so does the New York statute. If an appeal were permitted from a part of a decree only, it is manifest that only that part of the decree from which the appeal was taken would be properly before the appellate tribunal. Even though the entire decree had been copied into the record, it would not be before the court in any such way as that its provisions, other than those appealed from, could be noted.

At the argument, counsel for the appellants referred to some cases touching the necessity or lack of necessity

of making some of the parties to the action below parties to the appeal. It was said that it had been decided that in the present instance the mortgagor is a necessary party to the appeal. These are questions altogether beside the one under consideration, and the authorities discussing the subject of who are or who are not necessary or proper parties to the appeal have no application to the question as to whether jurisdiction is conferred upon this court upon an appeal from a part of a judgment, or whether an appeal of that character permits any review here.

We take this opportunity to present to the court some further considerations touching the question as to whether the mortgage of the appellant Central Trust Company is superior to the judgment of the appellee.

So far as the question of superiority depends upon whether the appellant mortgagor came into existence under the provisions of Chapter XXV or Chapter XXXV of the General Laws of the State of Montana, Fifth Division of the Compiled Statutes, we called the attention of the court at the argument to the alternative confronting the appellants, namely, that if the appellant mortgagor was created under the provisions of Chapter XXXV, the judgment is superior to the lien of the mortgage by the express provisions of that Chapter—Section 707 thereof; if it was created under the provisions of Chapter XXV, it had no right whatever to execute this mortgage, and the appellant mortgagee can claim no rights under it.

Chapter XXV gives to corporations created under its

provisions the express power to execute a mortgage upon its property, rights and franchises. Chapter XXV gives corporations created under its provisions no such right. An ordinary commercial corporation has the implied right to execute mortgages upon its property, but the ordinary commercial corporation enjoys no franchises except the franchise, if it may be so called, of being a corporation, (which need not be taken into consideration here) involving correlative public duties.

The original brief of the appellee referred to the rule that corporations "*having public duties to perform*, such as railway companies, canal companies, turn-pike companies, gas light companies and the like," have, without the consent of the legislature, no power or authority to mortgage their franchises or any of their property necessary to discharge those public duties, and at the argument the attention of the court was directed to the fact that no power whatever is conferred upon the corporations organized under the provisions of Chapter XXV to execute mortgages upon property of this character, or at all.

It is, accordingly, a matter of entire indifference, in the determination of this appeal, whether the appellant mortgagor was created under the provisions of Chapter XXV or Chapter XXXV. If it was created under the provisions of Chapter XXXV, the appellee's judgment is confessedly superior to the mortgage; if it was created under the provisions of Chapter XXV, the mortgage is altogether void, and, accordingly, the appellant mortgagee has no right to complain of the decree. It has no right

to complain that it did not get as much as it is entitled to, if it was not entitled to anything at all.

Further, the corporation having no power to execute a mortgage if it was created under the provisions of Chapter XXV, and having the power to execute a mortgage, if it was created under the provisions of Chapter XXXV, the court is bound to presume, in the absence of allegation, that it lawfully exercised the power, namely that it was created under the provisions of the law which gave it the right to execute the mortgage.

We deem it important to call the attention of the court further to the authorities holding that the appellant mortgagor had no power to execute this mortgage if it was created under the provisions of Chapter XXV. The rule to which we appeal has been repeatedly declared by the Supreme Court of the United States and is asserted with unanimity by the text writers.

The rule prohibiting alienation in any form will be found expressed in

> Jones on Corporate Bonds and Mortgages, Secs. 2-3,

and, touching the subject of mortgages specially, the learned author of that work says, at Section 3:

> "Inasmuch as every mortgage may in the end result in an absolute transfer of the mortgaged property, it follows that such a corporation cannot, without special authority, mortgage its property and give to the mortgagee, upon default, the right to exercise its public duties and functions, or the power to sell and convey those privileges to another."

In

3 Wood's Railway Law, Sec. 455,

it is said:

> "It is now quite well settled that, without legislative authority, a railway company has no power to transfer its franchises, either absolutely or by way of mortgage, or its railway or 'permanent plant,' because this would enable the company to deprive itself of the power to discharge its public duties and to transfer to another the right to exercise those functions and privileges which the Legislature had conferred upon it."

This principle was declared and applied by the Supreme Court of the United States in the case of

Thomas vs. Railroad Co., 101 U. S., 71,

the court expressing its views in the following language:

> "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing these functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposed, is a violation of the contract with the State, and is void as against public policy."

To the same effect are

Penn ylvania R. R. Co. vs. St. Louis Co., 118 U. S., 290;

Branch vs. Jessup, 106 U. S. 468;

Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S. 24;

O. R. & N. Co. vs. Oregonian Co., 130 U. S. 1.

In Richardson vs. Sibley, 87 Am. Dec. 700,
the supreme court of Massachusetts held that a street railway company has no power to mortgage its franchise, rights or property, without legislative authority, and that a mortgage made without such authority is wholly void.

See also

Wood vs. Truckee Turn-pike Co., 24 Cal. 474;
Atlantic vs. Union Pacific Ry. Co., 1 Fed. 745-747.

In a recent case, the supreme court of California held that where a corporation secures a franchise, by municipal grant, to operate gas and electric works and to supply the inhabitants with the product, it becomes its legal duty so to do, and a lease of its works and privileges is *ultra vires*, and void as against public policy.

Visalia vs. Sims, 104 Cal. 331.

It may be contended that, by virtue of the provisions of Section 482, one of the sections of Chapter XXV, which provides, among other things, that every corporation formed under the provisions of that chapter has power to "hold, purchase, and convey such real and personal estate as the purposes of the corporation may require," the execution of the mortgage under consideration is justified in view of the use of the word "convey" in this section. But the authorities do not sustain this contention.

In one of the cases above cited the supreme court said:

> "A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to

> the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, *nor a general authority to sell and dispose of property*, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incoroprated by special charter from the Legislature, and to those formed by articles of association under general laws."
>
> Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S. 24-61.

The meaning of the statute last above referred to, giving corporations of this class power to convey their property, is expressed by the Supreme Court of the United States in

Branch vs. Jessup, 106 U. S. 468,

in the following language:

> "Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad; and it does not extend to the sale of the railroad itself or of the franchises connected therewith."

In the case of

Coe vs. Columbia R. R. Co., 10 Oh. St. 372,

a statute authorized the company to "acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the corporation." It will be perceived that this language is very similar in terms, and substantially identical in significance, with that part of Section 482 quoted above.

It was held in the case last above referred to that the statute considered did not authorize the corporation to transfer all of its property by one conveyance and thus practically put itself out of existence.

In Jones on Corporate Bonds and Mortgages, 3-4,

it is said:

> "Even when organized under a statute providing that the corporation may acquire and convey at pleasure all such real estate as may be necessary and convenient to carry into effect the object of the incorporation, a railroad company has no power to alienate its franchises to be a corporation, or the franchise to construct and maintain a railroad, and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held solely to and exclusively for the purpose of the exercise of such franchise."

The appellants refer in their brief to the case of

New Orleans vs. De La Mona, 114 U. S. 507-508,

in support of the contention that a railroad company may mortgage its road and subordinate franchises, but it clearly was not intended by that case to announce any rule at variance with that declared in the many cases above cited. It was assumed in that case that legislative sanction for the execution of the mortgage was not wanting.

It will have been observed also from the cases above cited, that it is not simply a question of ultra vires, but that a contract mortgaging or selling the property is void, as contrary to public policy.

Some claim is made in the brief of appellants to the

effect that the mortgagor appellant must be considered to have been created under the provisions of Chapter XXV, and not of Chapter XXXV, because it was engaged in furnishing gas and electricity as well as operating a street railway, but it will be noted that, by the authorities, a gas company or an electric light company, is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway company. Besides the business of furnishing gas and electric lights is as foreign to the business of a street railway company as it is to the business of a commercial railway company.

In the brief of appellants some argument was made to the effect that the mortgagor company had no franchise and did not mortgage any. It may possibly be contended along the same line that, having no franchise, there was no restriction upon its power to execute a mortgage. We think it was shown with sufficient clearness that the rights and privileges which the mortgagor company enjoyed by virtue of the ordinances of the City of Helena and the acts of the legislature of the state, are properly denominated "franchises," but that is not really the test. If it has *public duties to perform*, it cannot alienate its property by sale, lease or mortgage, without the express consent of the legislature. That the appelant mortgagor has public duties to perform is a proposition that canont be considered as seriously debatable.

In consideration of the street railway company's occupying the streets with its tracks and cars, it is obliged to perform the public duty of carrying the public on its cars,

and at such rates as the ordinance may prescribe. The ordinance granting it the right to occupy the streets is a contract within the protection of the federal constitution prohibiting the impairment of the obligation of contracts, as has been repeatedly declared by the Supreme Court of the United States. Even the appellants would not maintain that the tracks and cars of the appellant mortgagor, or its electric light wires strung in the streets, or its gas tanks in use, could be seized and sold upon execution.

Gregory vs. Blanchard, 98 Cal. 313.

If it had any property separate and apart from that in use in the performance of its public duty, such property could be seized upon execution and could be mortgaged or otherwise conveyed.

Risdon vs. Citizens, 122 Cal. 97.

At the argument some contention was made, notwithstanding the allegations of the complaint and the characterization of the instrument therein and in the decree as a mortgage, that it is not in fact a mortgage, but a trust deed, with a power of sale, and that the legal title to the property was by it conveyed to the appellant Central Trust Company in 1895. If this is the true construction to put upon this instrument, then it would appear that, notwithstanding the appellant Central Trust Company has owned the property since the year 1895, it allowed the appellant Helena Power and Light Company to manage and operate it under some arrangement existing between the two, the nature of which is not disclosed.

If this is true, then the Central Trust Company is, under all the authorities, liable for torts committed in the operation of the road by the Helena Power and Light Company.

Lee vs. Southern Pacific, 116 Cal. 97;
Balsley vs. St. Louis, 8 N. E. 859,

and its property is, of course, subject to answer for the obligation.

Lest it might possibly be overlooked by the court, as it apparently has been by the counsel for the appellants, we again call attention to the fact that the answer of the defendant Warren set up not only the judgment recovered by him against the Helena Power and Light Company, but averred further that the facts concerning the liability were as set out in his complaint in the action brought against the Helena Power and Light Company; and reference was made to a copy of the said complaint attached to the answer and made a part of it. The appellant Central Trust Company raised no issue whatever upon any of the allegations of the answer. It filed no replication, but moved for judgment upon the complaint and answer after its motion for judgment as in the complaint prayed, was by the court denied, asking just such a judgment as it got.

This procedure, upon settled principles, concedes the truth of the allegations made in the answer. It is, accordingly, admitted by the appellant Central Trust Company that the facts concerning the injuries suffered by the appellee and the circumstances under which he was injured, are as set out in his complaint in his action

against the appellant Helena Power and Light Company, a copy of which was attached to the answer.

The jurisdiction of this court has not been properly invoked, but if it had been, the appellants have no cause to complain of the decree in the particular in which it is alleged to be erroneous.

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